Supreme Court, U. S.
FILED
JAN 9 1980
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1079

GARY ROHRER,
Petitioner,

vs.

STATE OF MISSOURI,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

For the Supreme Judicial Court of the State of Missouri.

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For the Supreme Judicial Court of the State of Missouri.

OPINION BELOW

The opinion of the court of appeals below (App. A infra. pp. A-1—A-12)is as yet unreported. The notice of the Clerk of the Court of Appeals notifying Petitioner's counsel of the court's denial of Petitioner's Motion for Rehearing or to Transfer this Cause to the Supreme Court of Missouri (App. B infra. p. A-13) was dated November 9, 1979. The Order of the Supreme Court of Missouri denying Petitioner's Application to Transfer (App. C. infra. p. A-14) was entered December 6, 1979.

JURISDICTION

The order of the Supreme Court of Missouri denying the Petitioner's Application to Transfer from the Court of Appeals was entered on December 6, 1979. The jurisdiction of the Court is invoked under 28 U.S.C. § 1257 (3).

QUESTION PRESENTED

WHETHER the affidavit of an affiant police officer was sufficient to support the issuance of a search warrant for the premises of petitioner's house wherein the affidavit set forth the following:

(1) An informer of unestablished reliability informed the affiant officer that he (the informer) had recently personally observed a substantial quantity of marijuana in the attic of petitioner's residence and that the marijuana was present at the time of the passage of the information;

(2) Directions to petitioner's residence and to nearby marijuana fields;

(3) The location of the affiant officer of petitioner's residence and the nearby marijuana fields as a result of following the informer's directions;

(4) The affiant officer's knowledge of the petitioner's reputation as a drug dealer.

CONSTITUTIONAL PROVISION INVOLVED

Fourth Amendment

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

On April 8, 1977 a search warrant for the residence of Petitioner was authorized by an Associate Circuit Judge of Taney County Missouri. On the same day the search warrant was executed by the Sheriff's department of Taney County and resulted in the discovery and confiscation of a substantial quantity of marijuana in the attic of the Petitioner's residence. Soon thereafter Petitioner was arrested as a result of the search and seizure of his residence pursuant to the issuance of the search warrant as above described.

On May 3, 1977, the Petitioner, Gary Rohrer, was charged by Information by the Prosecuting Attorney of Taney County with the crimes of possession of *cannabis sativa* of a quantity in violation of section 195.030 of the Missouri Revised Statutes and cultivation of a certain controlled substance to wit; marijuana in violation of Missouri Revised Statutes 195.030.

On December 12, 1977, after a jury trial, the Petitioner was found guilty of the possession count and acquitted of the cultivation count. Prior to trial, counsel for Petitioner filed a Motion to Quash Search Warrant and a Petition in Support of Motion to Quash Search Warrant and a Motion to Suppress Evidence. Among other things, the latter motion raised the issue: "That the aforesaid search warrant was and is invalid for the following reasons: the affidavit signed by Deputy Rozell states no information on which the court could base reliability of the named informant;" There were two affidavits filed in support of the search warrant. However, the basic statement of Deputy Michel's affidavit was that the affidavit of Deputy Rozell was true and correct. Therefore, only the affidavit of Deputy Rozell (attached as Exhibit B) merits examination and all prior judicial legal scrutiny in the instant case was directed at the Rozell affidavit. Exactly stated, the Rozell affidavit is as follows:

AFFIDAVIT

STATE OF MISSOURI }
} ss.
COUNTY OF TANEY }

David L. Rozell, first being duly sworn on this oath states: That I am a Deputy Sheriff and Major Crime Investigator and that on 4/7/77 I was contacted by a person who stated that they had first hand information about the location of a large quantity of marijuana.

They also stated that they had recently seen a large quantity of marijuana stored in the atic (sic) of the Gary Rohrer residence. They stated that the marijuana is currently in the atic and that we would have no trouble finding the marijuana in the attic. They gave the following detailed directions to the location of the Rohrer residence by which officers easily located said house:

> Go to Taneyville and turn right onto Highway FF.
>
> Go to the end of the pavement and turn to the right on the dirt road. Follow the dirt road until you come to a definite fork in the road and take the left fork to the house on the hill.

On the evening of 4/7/77 this same person gave information and directions to Deputy Michel on the location of a field of marijuana which Gary Rohrer is cultivating. Through these directions Deputy Michel easily located three patches of marijuana in addition to several potted plants of marijuana.

It is the common knowledge of this officer and other members of the Law Enforcement community in Taney County that Mr. Rohrer has been involved in the cultivation and sale of controlled substances for the past few years. Mr. Rohrer has ben seen on numerous occasions associating with known drug

users and dealers. This officer has also received information from members of the community that Mr. Rohrer has the reputation of being a drug dealer.

/s/ David L. Rozell

Subscribed and sworn to before me this 8th day of April, 1977.

/s/ Joe Chowning
Notary Public

(sic) My commission as Notary Public expires: _____, 19____.

Following a pre-trial hearing, the trial judge orally overruled all motions to quash the search warrant and to suppress illegally seized evidence and the cause proceeded to trial. On appeal, the Missouri Court of Appeals, on October 22, 1979, affirmed the trial court and on November 9, 1979, the Court entered a denial of Petitioner's Motion for Rehearing or to Transfer this cause to the Supreme Court of Missouri. The Supreme Court of Missouri on the sixth day of December, 1979, denied the Petitioner's application to transfer the case from the Court of Appeals.

REASONS FOR GRANTING THE WRIT

The instant case presents an excellent judicial vehicle for needed explication of the decisions of this Court in *Aguilar* v. *Texas,* 378 U.S. 108, 12 L. Ed. 2d 723, 84th S. Ct. 1509 (1964) and *Spinelli* v. *U.S.,* 393 U.S. 410, 21 L. Ed. 2d 637, 89 S. Ct. 584 (1969). In addition this cause creates an opportunity to resolve an existant conflict between the majority opinion of *Spinelli* and Part II of the opinion of the Chief Justice in *U.S.* v. *Harris,* 403 U.S. 573, 29 L. Ed. 2d 723, 91 S. Ct. 2075 (1971) in which three justices concurred. The point of conflict is raised by the statement of the Chief Justice that:

> "We cannot conclude that a policeman's knowledge of a suspect's reputation-something that policemen frequently know and a factor that impressed such a "legal technician" as Mr. Justice Frankfurter-is not a "practical consideration of everyday life" upon which the officer (or a magistrate) may properly rely in assessing the reliability of an informant's tip. To the extent that Spinelli prohibits the use of such probative information, it has no support in our prior cases, logic or experience and we decline to apply it to preclude a magistrate from relying on a law enforcement officer's knowledge of a suspect's reputation."

There has arisen a clamor from the lower courts for resolution of this apparent conflict and for clarification of the confusion now rampant in the lower courts relative to judicial evaluation of an affidavit in support of a search warrant based on the tip of an informer. The Missouri Court of Appeals quoted *U.S.* v. *Marihart,* 472 F. 2d 809 (1972) an opinion of the Eighth Circuit Court of Appeals wherein at page 814 it was stated:

> "It does not seem to us, however, that in view of the concurring opinion of Mr. Justice White in *Spinelli* and Mr. Justice Blackmun in *Harris,* in view of the split voting pattern in those two cases, the lower federal courts would be well served if the Supreme Court would clarify its views as to warrants and searches premised upon informer's tips."

In *Aguilar* v. *Texas,* 378 U.S. 108, 12 L. Ed. 2d, 723, 84 S. Ct. 1509 (1964), Justice Goldberg speaking for a six member majority of the Court established the famous two-pronged test of the sufficiency of an affidavit for search warrant that an issuing magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which it was concluded that the informant was "credible" or his information "reliable."

Under this two-pronged test, the affidavit in the instant case is insufficient. The affidavit only sets forth that an informer of unestablished reliability viewed marijuana in the attic of Petitioner's residence. In addition, the informer gave directions to the residence and nearby marijuana field and from these directions the affiant officer located the house and the nearby marijuana field. The above, plus the affiant officer's stated knowledge of Petitioner's reputation as a drug dealer constitute the entire factual basis of the search warrant. The Missouri Court of Appeals initiating its analysis was correct in noting that: "*Spinelli* thus stands squarely for the proposition that even if the two-pronged test of *Aguilar* is not met, the information before the magistrate may be sufficient if as in *Draper,* (*Draper* v. *U.S.,* 358 U.S. 307, 3 L. Ed. 2d 327, 79 S. Ct. (1959) it is sufficiently detailed, or sufficiently corroborated to supply as much trustworthiness as does the *Aguilar* test."

To overcome the failure to comply with both prongs of the dual *Aguilar* standards, the Missouri Court of Appeals relied on the following: (1) The informer's naked statement of personal observation of the marijuana coupled with directions to the residence and nearby marijuana field. (2) Corroboration by the affiant police officer's location of the residence of and marijuana field following the informer's directions.

Clearly, neither prong of the *Aguilar* test is met by the affidavit in this case. In *Jones* v. *U.S.*, 362 U.S. 257 4 L.Ed.2d. 697, 80 S.ct. 125 (1960), the court was confronted with ruling on an affidavit where the affiant swore that on the day prior to the making of the affidavit an unnamed informant told him that Jones and an accomplice "were involved in the illicit narcotic traffic" and "kept an ready supply of heroin on hand" in his apartment. Further, the affiant supplied the following information as obtained from the unnamed informant:

1. The informant had purchased narcotics from Jones on many occasions, the last being the day prior to the day of the application for the warrant;

2. The prior reliability of the informer;

3. The admissions of Jones and his accomplice that they were drug users; and

4. Other sources of information had supplied the same information as supplied by the unnamed informant.

The court in *Jones,* 362 U.S. 257, at page 271, noted a hypothetical example very similar to the instant case:

> "Thus we may assume that Didone (the police affiant)[1] had the day before been told, by one who claimed to have bought narcotics there, that petitioner was selling narcotics in the apartment. Had that been all, it might not have been enough; but Didone swore to a basis for accepting the informant's story. The informant had previously given accurate information. His story was corroborated by other sources of information. And petitioner was known by the police to be a user of narcotics. Corroboration through other sources of information reduced the chances of a

[1]Identifying quotation added.

> reckless or prevaricating tale; that petitioner was a known user of narcotics made the charge against him much less subject to scepticism than would be a charge against one without such a history."

Does the combination of criteria invoked by the Missouri Court of Appeals suffice to overcome the absence of compliance with either *Aguilar* test particularly the second prong or establish a credibility for the informer or reliability for his information? In *Spinelli,* the court criticized the affidavit because the affiant described the informant as "reliable" without offering reasons or factual support for this conclusion. In *Harris,* the Court criticized the attempt to play on the technical use of the word "prudent" as opposed to the word "reliable." The Petitioner would suggest that allegations or statements of personal observation absent the circumstances of time of observation, description of the scene or scene observed, and the ability of the informant to render the conclusions advanced are essentially conclusory in nature and questionable in effect.

The effort as condoned by the Missouri courts because of the paucity of information offered leaves unresolved questions and lowers the standard of probable cause advanced by this court.

The lack of compliance then raises corollary questions as follows:

1. How did the informer know the substance observed was marijuana? There is no establishment of the informer's background or statements of the Petitioner sufficient to assist the issuing judicial officer in determination of the how the informer knew the substance was in fact marijuana.

2. The term "recently" is so vague as to create the possibility of stale information.

The Court of Appeals heavily relies on *Draper* to support its decision. The extent of police corroboration necessary to overcome deficiencies in compliance with the two *Aguilar* standards

seems to be the *gravamen* of the evaluation of the affidavit in the instant case.

Spinelli established *Draper* as the bench mark from which it could be established that independent corroboration of an informer's information by the affiant police officer could overcome noncompliance with the dual *Aguilar* standard. The *Draper* case supplied the following information:

1. The mode of travel;
2. The time of arrival; and
3. Exact physical and dress description.

In addition, the only *Aguilar* standard missing was the method of obtaining information as the previously reliable nature of the informer was established. The police in *Draper* personally corroborated every detail.

In the instant case, the information supplied was the directions to the residence of the Petitioner and the alleged directions to the marijuana field. There is no showing of the directions to the marijuana field as there were to the house and no showing of the location of the marijuana field in proximity to the house. The alleged corroboration is to solely these two items and, of course, the detailed items are the directions to the house, the innocent detail. Utilizing *Draper* as a benchmark as set forth in *Spinelli,* this affidavit fails and the decision is in conflict with the stated decisions. It is true that a detailed statement given by the informer overcomes the deficiency of the failure to set forth underlying circumstances. The breadth of the holdings in *Draper* and *Spinelli* creates an irreconcilable conflict between the decision of the Missouri Court of Appeals and those opinions.

The decision of the Court of Appeals in distinguishable from the holding of the United States Supreme Court in *United States* v. *Harris,* 403 U.S. 573, 29 L.Ed.2d. 723, 91 S.ct. 2675. At page

eight of the opinion challenged herein, the Court of Appeals' opinion states "In *Harris,* there was no averment of underlying circumstances to support the informer's credibility and this the first of *Aguilar's* two-prongs was not satisfied." However, in *Harris,* the affidavit stated: "This date, I have received information from a person who fears for their (sic) life and property should their name be revealed. I have interviewed this person, found this person to be a prudent person and have under a sworn verbal statement, gave the following information: "This person has personal knowledge of and has purchased illicit whiskey from within the residence described, for a period of more than two years, and most recently within the past two weeks, has knowledge of a person who purchased illicit whiskey within the past two days from the house, has personal knowledge that the illicit whiskey is consumed by purchasers in the outbuilding known as and utilized as the 'dance hall' and has seen Roosevelt Harris go to the other outbuilding, located about fifty yards from the residence on numerous occasions, to obtain the whiskey for this person and other persons."

If the above affidavit does not establish *Aguilar's* first prong or "descriptions of underlying circumstances" it is difficult to visualize an affidavit that would comport to that mandate. The Court of Appeals is correct in that *Aguilar's* second prong is absent as is independent corroboration by the affiant. However, the opinion is incorrect to cite this case as authority in relying on character evidence as strongly as advocated here. *Harris* is distinguished from any other case because of the Court's reliance on a new element "statements against penal interests" as indicia of the reliability of the informer. *U.S.* v. *Harris,* 403 U.S. 573 583.584, 29 L.Ed.2d. 723, 734, 91 S.ct. 2075 (1971). This holding clearly distinguishes *Harris* from any other search warrant case. However, *Harris* did establish that a "substantial basis" for independent judgment is necessary for establishing probable cause.

Consideration of this case by the Court would permit reconciliation and consideration of several conflicting or confusing decisions. Further, one judicial decision is needed to establish parameters for future trial courts that are continually confronted with the questions herein raised.

CONCLUSION

The decision of the Missouri Courts, particularly the decision of the Court of Appeals should be reversed with instructions to sustain the Petitioner's Motion to Quash the arch Warrant and to suppress the evidence seized as a result of the execution of the said warrant.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE MISSOURI COURT OF APPEALS
Southern District
Division Two

STATE OF MISSOURI,
Plaintiff-Respondent,

vs. No. 11066

GARY ROHRER,
Defendant-Appellant.

APPEAL FROM THE CIRCUIT COURT OF
TANEY COUNTY, MISSOURI

Honorable James Clifford Crouch, Judge

(FILED Oct. 22, 1979)

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Paul M. Storment, Jr.
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AFFIRMED

MAUS, J. The defendant was charged in two counts with (I) possession of marijuana and (II) growing and cultivating marijuana. A jury found him guilty upon Count I and not guilty upon Count II. On appeal, defendant's sole allegation of error is that the trial court erred in not quashing a search warrant and in not suppressing evidence seized as a result of that warrant. In

turn, this allegation is founded upon the assertion that the affidavits upon which the warrant was issued do not within the constitutional meaning establish "probable cause". U.S. Const. Amend. IV; Mo. Const. Art. I § 15.

In the consideration of the problems of search and seizure, by necessity, the controlling opinions express much judicial philosophy (an analysis of the grounds and concepts expressing fundamental beliefs) in balancing the rights of the individual against the interest of society. In determining the validity of the issuance of a search warrant this analysis centers upon the constitutional prerequisite of "probable cause". Such expressions have seemingly created a thicket of judicial variances difficult to penetrate to visualize the boundary lines established. Such expressions have been described as "complex analyses and obfuscatory language". Spinelli v. United States, 393 U.S. 410, 435, 21 L.Ed.2d 637, 654, 89 S.Ct. 584, 598 (1969). Nevertheless it is the duty of law enforcement officers and courts issuing search warrants to proceed within these boundaries. It is the duty of the trial court and this court to determine that they have done so. While it is undertaken with fear and trepidation of adding to the obfuscation, a review of the cases seems necessary to the disposition of this appeal.

In substance the affidavit upon which the warrant was issued on April 8, 1977, to search the residence of Gary Rohrer was based stated: That the affiant was a deputy sheriff and major crime investigator; that on April 7, 1977, an informant stated she had recently seen a large quantity of marijuana in the attic of the defendant's residence; that the marijuana was currently in the attic; that the informant gave detailed directions on the

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[1] Webster's New Collegiate Dictionary.

route to the rural residence; that this informant also gave information and directions to a field of marijuana the defendant was growing; and that using these directions officers easily located the residence and the field of marijuana. The affiant further stated that it was common knowledge the defendant had for the past few years been involved in the cultivation and sale of controlled substances; that the defendant had been seen on numerous occasions associating with known drug dealers and users; and that the defendant had a reputation of being a drug dealer.

In testing and interpreting the affidavit to show probable cause we are admonished to consider the following guideline:

> "[T]he Fourth Amendment's commands, like all constitutional requirements, are practical and not abstract. If the teachings of the Court's cases are to be followed and the constitutional policy served, affidavits for search warrants, such as the one involved here, must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion. They are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area. A grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting." United States v. Ventresca, 380 U.S. 102, 108, 13 L.Ed.2d 684, 689, 85 S.Ct. 741, 746 (1965).

Other principles to be observed include the following: [O]nly the probability, and not a prima facie showing, of criminal activity is the standard of probable cause." Spinelli v. United States, supra, 393 U.S. at 419, 21 L.Ed.2d at 645, 89 S.Ct. at 590. Probable cause may be established by information provided by an informant and it is not necessary that the informant be

named in the affidavit.[2] Aguilar v. Texas, 378 U.S. 108, 12 L.Ed.2d 723, 84 S.Ct. 1509 (1964). However, it is when a warrant is based upon such information that the analysis to be employed in determining probable cause is most complex.

In Draper v. United States, 358 U.S. 307, 3 L.Ed.2d 327, 79 S.Ct. 329 (1959), a paid informer who had previously supplied accurate information gave an officer very detailed information concerning the defendant and his anticipated transportation of heroin. In finding the officer had probable cause to arrest the defendant the court said: "And surely, with every other bit of Hereford's information being thus personally verified, Marsh had 'reasonable grounds' to believe that the remaining unverified bit of Hereford's information—that Draper would have the herion with him—was likewise true". Draper v. United States, supra, 358 U.S. at 313, 3 L.Ed.2d at 332, 79 S.Ct. at 333.

In Aguilar v. Texas, supra, a search warrant was issued on the basis of an affidavit that the affiant received information from a credible person and believed the defendant possessed narcotics. The court noted the affidavit did not state that the informant spoke with personal knowledge, and the magistrate accepted "the informant's 'suspicion, belief or mere conclusion' ". The court then announced a standard which is referred to as the "two prong" test: "[T]he magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, . . . was 'credible' or his information

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[2] Concerning subsequent disclosure see V.A.M.R. Crim. Rule 25.39; State v. Edwards, 317 S.W.2d 441 (Mo. banc 1958); State v. Wandix, ____ S.W.2d ____ (Mo. 61201, Mo. banc 1979) and U.S. Supreme Court Standard 510, Weinstein's Evidence, §510.

'reliable.' " Aguilar v. Texas, supra, 378 U.S. at 114-115, 12 L.Ed.2d at 729, 84 S.Ct. at 1514.[3]

In Spinelli v. United States, supra, a search warrant was issued on the basis of an affidavit reciting the results of a surveillance of the defendant's activities on five days. This included trips on four days to an apartment house, on one of which when he was followed further he entered an apartment in which there were two phones. It further stated the defendant was known as a bookmaker and gambler and as an associate of bookmakers and gamblers. It concluded that a reliable informant said the defendant was conducting a bookmaking operation by those two telephones. In enunciating the standards by which the sufficiency of the affidavit was to be measured the court said:

> "The informer's report must first be measured against *Aguilar's* standards so that its probative value can be assessed. If the tip is found inadequate under *Aguilar,* the other allegations which corroborate the information contained in the hearsay report should then be considered. At this stage as well, however, the standards enunciated in *Aguilar* must inform the magistrate's decision. He must ask: Can it fairly be said that the tip, even when certain parts of it have been corroborated by independent sources, is as trustworthy as a tip which would pass *Aguilar's* tests without independent corroboration?" Spinelli v. United States, supra, 393 U.S. at 415, 21 L.Ed.2d at 643, 89 S.Ct. at 588.

The court then found the affidavit did not pass either prong of the *Aguilar* test: the affiant offered no reason in support of his conclusion the informant was reliable; and the tip did not contain a sufficient statement of the underlying circumstances from

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[3] The alternative the informant was "credible *or* his information reliable" has received but little notice.

which the informant concluded the defendant was conducting a book making operation. In this connection the court emphasized the fact the informant did not profess any personal knowledge.

> "In the absence of a statement detailing the manner in which the information was gathered, it is especially important that the tip describe the accused's criminal activity in sufficient detail that the magistrate may know that he is relying on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation." Spinelli v. United States, supra, 393 U.S. at 416, 21 L.Ed.2d at 644, 89 S.Ct. at 589.

The detail in the report in *Draper* was cited as a basis from which a magistrate "could reasonably infer that the informant had gained his information in a reliable way". Spinelli v. United States, supra, 393 U.S. at 417, 21 L.Ed.2d at 644, 89 S.Ct. at 589. The observed activities of the defendant were found not to be of themselves indicative of criminal activity and not sufficient to support probable cause. The court declared the assertion the defendant was a known gambler could not be used to give additional weight to an otherwise insufficient affidavit. The affidavit was condemned because it "falls short of the standards set forth in *Aguilar, Draper* and our other decisions that give content to the notion of probable cause." Spinelli v. United States, supra, 393 U.S. at 419, 21 L.Ed.2d at 645, 89 S.Ct. at 590.[4]

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[4] The other cases cited are United States v. Ventresca, 380 U.S. 102, 13 L.Ed.2d 684, 85 S.Ct. 741 (1965) and McCray v. Illinois, 386 U.S. 300, 18 L.Ed.2d 62, 87 S.Ct. 1056 (1967). These cases have received but little express attention as setting forth standards of probable cause, although both involved informant's tips corroborated by officers observations of incriminating circumstances or suspicious activities. United States v. Ventresca, supra, was cited with approval in Andresen v. Maryland, 427 U.S. 463, 49 L.Ed.2d 627, 96 S.Ct. 2737 (1976).

United States v. Harris, 403 U.S. 573, 29 L.Ed.2d 723, 91 S.Ct. 2075 (1971), involved, as does this case, the report of an informant expressly relating personal observation. In part I of the opinion (in which four justices concurred) the court cited with approval Jones v. United States, 362 U.S. 257, 4 L.Ed.2d 697, 80 S.Ct. 725 (1960) also involving recent personal observations. Such recent personal observation established that the informant's information had been gained in a reliable way, distinguishing the case from *Spinelli.* The fact the affidavit declared the informant to be "prudent" rather than "credible" was not decisive and noted that a bare statement that the affiant believed the informant to be truthful would not in itself supply a factual basis for credibility. However, the affidavit, which was detailed in nature, when coupled with the affiant's knowledge of the defendant's background, contained an ample factual basis for believing the informant. In part II of the opinion (in which three justices concurred), the court emphasized the "substantial basis" test applied in *Jones,* which included personal observation, previously accurate information supplied by the informant, corroboration by other unnamed sources and the defendant's reputation. Previous reliability was declared not to be essential. The *Spinelli* prohibition against consideration of the defendant's reputation was disapproved. In part III of the opinion (in which four justices concurred) the court emphasized that under the circumstances, the informant's admission of his own guilt in long time participation in criminal activity of buying illegal whiskey lent credence to the information supplied. Mr. Justice White agreed with Part III and concluded that as a whole the affidavit was sufficient. Four Justices dissented. The thrust of the dissent is that the credibility of the informant was not established. The dissent ascribes no weight to the affiant's assertion the informant was a credible person. The establishment of credibility by reason of personal observation was not approved. It was suggested that credibility might be supplied if the informant was "somehow responsible to the affiant", or by "a more than ordinarily detailed description of the suspect's

criminal activities", United States v. Harris, supra, 403 U.S. at 593, 29 L.Ed.2d at 739, 91 S.Ct. at 2086-2087, or by a description of "general background, employment, person attributes that enable him to observe and relate accurately, position in the community, reputation with others, personal connection with the suspect, any circumstances which suggest the probable absence of any motivation to falsify, the apparent motivation for supplying the information, the presence or absence of a criminal record or association with known criminals, and the like". United States v. Harris, supra, 403 U.S. at 600, 29 L.Ed.2d at 743, 91 S.Ct. at 2090. The dissent declined to find the requisite assurance of credibility, especially in the absence of a showing of lack of immunity from prosecution, in the admission of participation in criminal activities. Probable cause was not established by a prior confiscation of illegal whiskey, or in general reports concerning the defendant's criminal activities. The dissent did not deal with establishing credibility by corroboration other than to obserave that the informant's information had not been corroborated and to note "it will always be open to the officer to seek corroboration of the tip." United States v. Harris, supra, 403 U.S. at 600, 29 L.Ed.2d at 743, 91 S.Ct. at 2090.

Aguilar condemned a warrant based upon an affidavit alleging only reliable information and set forth a two-prong standard. *Spinelli,* in dealing with information not shown to be based upon personal observation, finds it insufficiently detailed and insufficiently corroborated by seeminly innocent activities to be trustworthy. However, it would seem the decisions do not establish a single rigid formula for determining probable cause. Apparently whether or not probable cause is established may depend on a variety of factors including: the extent of detailed information provided, whether or not the information is based upon personal observation, or whether or not it is corroborated, and the nature and extent of that corroboration. *Spinelli,* said to be the most restrictive decision, recognizes the viability of

Draper, Ventresca, and *McCray,* supra, n. 3. It recognizes that a tip "when certain parts of it have been corroborated by independent sources" can be "as trustworthy as a tip which would pass *Aguilar's* tests without independent corroboration". Spinelli v. United States, supra, 393 U.S. at 415, 21 L.Ed.2d at 642, 89 S.Ct. at 588.

The impact of these decisions has been summarized: "*Spinelli* thus stands squarely for the proposition that even if the two-pronged test of *Aguilar* is not met, the information before the magistrate may be sufficient if, as in *Draper,* it is sufficiently detailed, or sufficiently corroborated, to supply as much trustworthiness as does the *Aguilar* test." United States v. Marihart, 472 F.2d 809, 813 (8th Cir. 1972).

> "In *Harris,* there was no averment of underlying circumstances to support the informer's credibility and thus the first of *Aguilar's* two prongs was not satisfied. Furthermore, unlike *Draper,* none of the tip was corroborated by independent investigation. The corroboration consisted solely of the suspect's past record and reputation and other unspecified tips from undisclosed informants. The Court nevertheless affirmed the validity of the warrant, primarily because, according to the Chief Justice's plurality opinion, the underlying circumstances by which the informer acquired his information were said by the informer to be firsthand observation and activity, and because the credibility of this claim of firsthand knowledge was bolstered both by the fact it constituted an admission against penal interest and because the substance of the claim was corroborated to the extent mentioned above. . . . It does seem to us, however, that in view of the concurring opinions of Mr. Justice White in *Spinelli* and Mr. Justice Blackman in *Harris,* in view of the marked difference in tone between *Harris* and *Spinelli,* and in view of

the split voting pattern in those two cases, the lower federal courts would be well served if the Supreme Court would clarify its views as to warrants and searches premised upon informers' tips." United States v. Marihart, supra, 472 F.2d at 813-814.

In speaking of establishing the credibility of an informant to satisfy that prong of the *Aguilar* test it has been observed:

> "However, reliability of an informant may be demonstrated to the magistrate in many collateral ways. . . . In some instances where it is alleged that the informant was known to the affiant or had passed on previous information, this has been held to be a sufficient test of the reliability of the informant. Rugendorf v. United States, 376 U.S. 528, 84 S.Ct. 825, 11 L.Ed.2d 887 (1964); Jones v. United States, 362 U.S. 257, 271, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960). However, where the affiant officer does not know the informant it would be impossible for the affiant to vouch as to the informer's reliability.
>
> Under such circumstances reliability of an informant *may best be established by the affiant relating some corroboration* of the story which the informant tells. Furthermore, the underlying circumstance even without corroboration may have built-in credibility guides to the informant's reliability. The essence of reliability may be found in an informant's statement of facts rather than an allegation of mere conclusory suspicion. An informant who alleges he is an 'eyewitness' to an actual crime perpetrated demonstrates sufficient reliability of the person." McCreary v. Sigler, 406 F.2d 1264, 1268 (8th Cir. 1969). (Emphasis added).

The defendant relies upon Spinelli v. United States, supra, and State v. Phillips, 532 S.W.2d 533 (Mo.App. 1976). He emphasizes that the affidavit does not set forth the informant had

previously proved reliable or a statement the informant was reliable. While such allegations may aid in establishing the validity of a search warrant, they are not absolutely essential. McCreary v. Sigler, supra; State v. Phillips, supra. The basic reason the search warrants were found invalid in Spinelli v. United States, supra, and State v. Phillips, supra, is that the affidavits did not set forth the underlying circumstances from which the informant concluded the one defendant was bookmaking or the other defendant possessed narcotics.[5] That element is, as observed in those cases, supplied by personal observation, which clearly distinguishes those cases. Defendant fails to note the important distinction between an informant who divulges evidence of a crime obtained from sources unknown to the magistrate and the informant in this case who related matters gathered from this own observation. Cundiff v. United States, 501 F.2d 188 (8th Cir. 1974). Here, the informant gave detailed information based on personal observation. Such a statement may in itself sufficiently establish reliability of the informant. Cundiff v. United States, supra; United States v. Harrelson, 442 F.2d 290 (8th Cir. 1971); United States v. Wahlquist, 438 F.2d 219 (8th Cir. 1971). Also State v. Bradley, 485 S.W.2d 408 (Mo. 1972). In addition, in this case by the use of that information the residence and field of marijuana were easily located. The reliability of the informant was best "established by the affiant relating some corroboration" of the informant's information. McCreary v. Sigler, supra, 406 F.2d at 1269. Also see United States v. Howe, 591 F.2d 454 (8th Cir. 1979); United States v. Garrett, 565 F.2d 1065 (9th Cir. 1977).

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[5]In Draper v. United States, 358 U.S. 307, 3 L.Ed.2d 327, 79 S.Ct. 329 (1959) and United States v. Marihart, 472 F.2d 809 (8th Cir. 1972), a detailed statement demonstrated that an informant gained his information in a reliable way.

Under the authorities cited the warrant was issued on probable cause. Having so decided, the state's contention the defendant did not preserve his claim of error by proper objection need not be considered.

The judgment is affirmed.

ALMON H. MAUS, JUDGE

All concur

APPENDIX B

Office Of The Clerk
Missouri Court Of Appeals
Southern District

November 9, 1979

Mr. Tyce S. Smith
Attorney at Law
P. O. Box 494
Waynesville, Missouri 65583

In re: State v. Gary Rohrer
Case No. 11066

Dear Mr. Smith:

Today the Court issued the following order:

"Now, on this day, the Court, having fully considered appellant's motion for rehearing or to transfer this cause to the Supreme Court of Missouri, does overrule said motion for rehearing and does deny said application for transfer."

Yours very truly,

/s/ WILLIAM C. COCKRILL, Clerk

WCC/cs

cc: Mr. Paul Otto

APPENDIX C

NO. 11066

In the Supreme Court of Missouri

SOUTHERN DISTRICT

September Session 1979

State of Missouri,
Respondent,

vs.

Gary Rohrer,
Appellant

TRANSFER

Now at this day, on consideration of appellant's Application to transfer the above entitled cause from the Southern District Court of Appeals, it is ordered that said application be, and the same is hereby denied.

STATE OF MISSOURI—SCT.

I, THOMAS F. SIMON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the September Session thereof, 1979, and on the 6th day of December 1979, in the above entitled cause.

Given under my hand and seal of said Court,
at the City of Jefferson City, this 6th day of December 1979

/s/ Thomas F. Simon, Clerk,
by /s/ Jan Gallamon D. C.